



Atty Gen. Op. No. 10 - 1302

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January 25, 2010

Mary Ann McCoy
P.O. Box 293
Bethel, DE 19931

**RE: Freedom of Information Act Complaint
Against Town of Bethel**

Dear Ms. McCoy,

On October 9, 2009, the Delaware Department of Justice ("DDOJ") received your complaint that on August 4, 2009, the Town of Bethel ("Town") violated the Freedom of Information Act, 29 *Del. C.* ch. 100 ("FOIA"), when it held an executive session to discuss subdivision applications. We have received the Town's timely response to your complaint. This is the DDOJ's determination pursuant to 29 *Del. C.* § 10005(e).

RELEVANT FACTS

During the spring of 2008, two landowners, H&H Brand Farms and Glen R. Jones, submitted subdivision applications to the Town. These were referred to the Planning and Zoning Commission ("Commission"). After several public meetings over the course of a year, the Commission returned the applications to the Town Council without a recommendation as to whether to approve or deny them. The Town's posted agenda for its August 4, 2009 Town Council meeting included notice of an executive session for discussion of the H&H Brand Farms and Glen R. Jones subdivision applications. Although the agenda did not say so, the purpose of

the executive session was to receive legal advice from the Town's attorney regarding potential litigation over those subdivision applications.

The Town Council went into executive session at the August 4, 2009 meeting. Because the pending subdivision applications had been the subject of contentious public debate, and some of the opponents to the subdivisions previously had been involved in litigation with the Town in the past, the Town Attorney believed that whichever way the Council voted on the subdivision applications, the Town likely would be sued. The Town Attorney used the first few minutes of the executive session to advise the Council of the legal strengths and weaknesses of approving or disapproving the applications. After receiving that counsel, the Council discussed for an hour the merits of the applications. At times during that discussion, the Town Attorney gave the Council legal opinions on matters ancillary to the Council's approval of the applications—for example, on the effect of a new zoning ordinance on the pending subdivision applications. The Council voted on the applications, then returned to the public meeting and announced the votes. A member of the public advised the Council that FOIA requires all votes be taken in public, and the violation was immediately remedied by a public vote on each application. The public votes were identical to the votes taken in the executive session.

RELEVANT STATUTES

According to 20 *Del C.* § 10004(a), all meetings of public bodies must be open to the public, unless closed for one of the reasons provided in subsections (b), (c), (d) and (e) of that section. Subsection (b) provides that public bodies may meet in executive (closed) session for any of the purposes enumerated in that subsection. One of the enumerated purposes for an

executive session is “(4) [s]trategy sessions, including those involving legal advice or opinion . . . with respect to . . . potential litigation, but only when an open meeting would have an adverse effect on the . . . litigation position of the public body.” 20 *Del C.* § 10004(b)(4).

DISCUSSION

The threshold question here is whether the Town Council went into executive session for a proper purpose. The Town asserts that executive session was necessary because the Town was likely to face litigation regardless how the Council voted on the subdivision applications: either it would approve the applications and be sued by disgruntled residents, or it would deny the applications and be sued by disappointed applicants. The Town claims that it was entitled to meet in secret to receive legal advice concerning that potential litigation, because the advice, if made public, would adversely affect its litigation position.

The “potential litigation exception for executive session applies only when there is a ‘realistic and tangible threat of litigation’ based on ‘objective factors.’ Some indicia of such a situation might include a written demand letter, notice of threat to sue, or ‘previous or pre-existing litigation between the parties or proof of ongoing litigation concerning similar claims.’” *Del. Op. Att’y Gen. 02-IB12*, 2002 WL 1282812, at *4 (Del. A.G. May 21, 2002) (quoting *Claxton Enterprise v. Evans County Bd. of Comm’rs*, 549 S.E.2d 870, 874 (Ga. App. 2001)). A public body bears the “burden of proving that its action was justified when the propriety of an executive session is challenged.” *Common Cause of Del. v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 1995 WL 733401, at * 4 (Del. Ch. Dec. 5, 1995).

While “[r]eference to intense ‘public interest’ or ‘public scrutiny’ may be part of a public body’s calculus, . . . it cannot serve as a dispositive guide to whether an executive session is justified; otherwise, such an overly broad and poorly-defined metric could permit executive sessions to become less of an exception and more of the norm.” *O’Neill v. Town of Middletown*, 2007 WL 1114019, at *8 (Del. Ch. Mar. 29, 2007). Here, however, the Town faced more than public interest or scrutiny; it had experienced vocal hostility to the proposed subdivisions from members of the public who had in the past demonstrated a willingness to sue. We find that the Town was not obligated to discuss its litigation vulnerabilities before a public that included those highly likely to be plaintiffs. Thus, the Council was properly in executive session for the discussion of the strengths and weakness of its alternative positions.

However, the Council clearly exceeded a proper purpose for an executive session when it left the topic of potential litigation and, for an hour, discussed the applications on their merits. That discussion should have occurred in public. The Town Attorney did give legal advice throughout the discussion, but that advice did not concern pending or potential litigation and therefore did not need to be made outside public view.

We note also that the agenda stated only that the executive session would be held for “Discussion of Sub-Division applications,” which is not a proper topic for an executive session. Executive sessions are confined to the nine purposes enumerated in subsection (b) of 29 *Del. C.* § 10004, which do not include issuance of permits. Nor did the minutes of the executive session mention legal advice. It was necessary to refer to the audio recording of the executive session to determine whether the Council properly met outside of public view. Because FOIA permits the

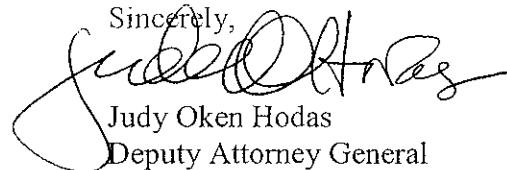
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minutes of an executive session that deal with non-public matters to be kept confidential, 29 Del. C. § 10002(g)(10), the minutes should have reflected, at a minimum, that legal advice concerning potential litigation was discussed.

CONCLUSION

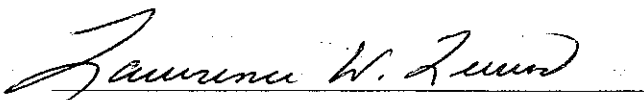
For the reasons stated above, although the Town of Bethel properly met in executive session to discuss the relative strengths and weaknesses of potential litigation, it violated FOIA when the discussion shifted to the merits of subdivision applications. As remediation, the Town must revise the minutes of the August 4, 2009 executive session to reflect that legal advice was given concerning potential litigation, and make the revised minutes publically available within 10 days.

Sincerely,



Judy Oken Hodas
Deputy Attorney General

APPROVED:



Lawrence W. Lewis
State Solicitor

cc:

Katrina Barbour, Opinion Coordinator
John E. Tarburton, Esquire